

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)

Robert B. Taylor)
Jupiter, Florida)

For Renewal of Station WTRU(FM))

Jupiter Broadcasting, Corp.)
Jupiter, Florida)

For a Construction Permit)

MM Docket No. 92-114

FCC File No. BRH-880926UJ

FCC File No. BPH-890103MD

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MAY 26 1992

To: Honorable Walter C. Miller
Administrative Law Judge

FCC MAIL ROOM

MOTION FOR PARTIAL SUMMARY DECISION

Respectfully submitted,
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May 22, 1992

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MOTION FOR PARTIAL SUMMARY DECISION

1. Jupiter Broadcasting Corp. ("JBC"), pursuant to Rule 1.251, requests summary decision in its favor of the renewal expectancy aspects of the standard comparative issue specified in this proceeding. JBC submits that Robert Taylor's failure to maintain a public file for stations WEXI(AM) and WTRU(FM), his false statements in license renewal applications and his actions keeping his stations WEXI(AM) and WTRU(FM) off-the-air require denial of renewal expectancy to Mr. Taylor.

PARTIES AND CALL SIGNS

2. Robert B. Taylor has controlled his AM and FM stations in Jupiter, Florida since September 18, 1984.¹ During Mr. Taylor's stewardship, these stations have been held by various entities² and have been assigned various call signs.³ For ease of reference, this Motion for Partial Summary Decision refers to the licensee of these stations as Mr. Taylor and to the call signs of these stations as WEXI(AM) and WTRU(FM).

¹Station WEXI(AM) was deleted on January 30, 1992 in response to Mr. Taylor's voluntary dismissal of the WEXI license renewal application.

²The Am station has been owned by (1) U.S. Two Broadcasting Corp., a subsidiary of R & R Broadcasting Corp. and by (2) Robert B. Taylor, individually. The FM station has been owned by (1) U.S. Three Broadcasting Corp., a subsidiary of R & R Broadcasting Corp. and by (2) Robert B. Taylor, individually.

³The AM call signs have been WVSI, WTRU and WEXI. The FM call signs have been WVSI-FM, WKSX and WTRU.

THE FACTS

3. Joint Operation. Stations WEXI(AM) and WTRU(FM) were colocated at 500 North Delaware Boulevard, Jupiter, Florida. They used a common studio and staff. The AM station, when it was operating, duplicated the FM station's programming.

4. WEXI/WTRU Public File. Robert B. Taylor did not maintain the public file required by Rule 73.3526 for Stations WEXI/WTRU. On January 18, 1989 Paul Levine and Charles Reid visited the stations' studios. They asked Robert Taylor to see the public file. The only documents that Mr. Taylor made available were JBC's applications (not Robert Taylor's applications) and the petition to deny the WEXI/WTRU renewals filed by Jose Oaks.⁴

5. On July 12, 1990 Joseph Belisle and Charles Reid visited the studios of Stations WEXI(AM) and WTRU(FM). They asked Steve May, the WTRU program director, to see the stations' public files. Mr. May had no documents for public inspection. Mr. May contacted Mr. Robert Taylor by telephone. Mr. Taylor and Joseph Belisle conversed concerning the availability of the public file. Mr. Taylor agreed to copy the public file and send it to Mr. Belisle.⁵

6. On July 12, 1990 counsel for JBC sent Robert Taylor the following letter, confirming his understanding of Mr. Taylor's agreement with respect to the WEXI/WTRU public file:

⁴See Declaration of Paul Levine appended hereto as Exhibit 1.

⁵See Declarations of Charles E. Reid, Tania M. Sanchez, Deborah Pelland and Laura Fajardo appended hereto as Exhibits 2, 3, 4 and 5, respectively.

VIA FEDERAL EXPRESS

Mr. Robert B. Taylor
Stations WEXI(AM) and WTRU(FM)
500 North Delaware Boulevard
Jupiter, Florida 33458

Dear Mr. Taylor:

This is to confirm the conversation we had this morning with respect to the public file for Stations WEXI(AM) and WTRU(FM), Jupiter, Florida. Steve May was unable to make this file available to Chuck Reid and me this morning when we stopped by the stations' studios. However, you have agreed to copy the public file and send it to me within a week. I have agreed to pay your photocopying and postage costs.

To assist you in identifying the documents I am seeking, I left a copy of the public file rule, Rule 73.3526, with Steve May. I'm enclosing a second copy of the rule with this letter. The specific documents I need are described in subparts (a) (1), (a) (2), (a) (3), (a) (4), (a) (5), (a) (6), (a) (7), (a) (9) and (a) (10) of Rule 73.3526.

Thank you for your cooperation in this matter.

Sincerely yours,

Joseph A. Belisle⁶

7. On July 16, 1990 counsel for JBC received the following letter from Mr. Taylor:

July 12, 1990

Joseph A. Belisle
Leibowitz & Spencer
Amerifirst Building, Suite 1450
One S.E. Third Avenue
Miami, Florida 33131

Dear Mr. Belisle:

⁶See Exhibit 3.

Enclosed are copies of the WTRU public file documents which I have with me today.

The complete WTRU public file is in my office at the radio station building in Jupiter. I am temporarily in Indiana on business. As we agreed in our telephone conversation today, upon returning to my Jupiter office I will photocopy the other documents in the WTRU public file and mail them to you in Miami.

Sincerely,

Robert B. Taylor
Licensee, WTRU (FM)
Licensee, WEXI (AM)

Enclosed with Mr. Taylor's letter were the following documents comprising twenty one pages:

- (a) Letter dated 4/6/89 from Robert B. Taylor to Donna R. Searcy transmitting a petition to deny JBC's AM application, BP-890103AB;
- (b) Petition to Deny dated 4/6/89 opposing JBC's AM application, BP-890103AB;
- (c) Letter dated 7/20/89 from Robert B. Taylor to Donna R. Searcy transmitting a petition to deny JBC's FM application, BPH-890103MD; and
- (d) Petition to Deny dated 7/20/89 opposing JBC's FM application, BPH-890103MD.

See Declaration of Deborah Pelland, Exhibit 4, hereto.

8. On July 25, 1990, counsel for JBC sent Robert Taylor the following letter requesting the remainder of the WEXI/WTRU public file:

VIA FEDERAL EXPRESS

Mr. Robert B. Taylor
Stations WTRU/WEXI
500 North Delaware Boulevard
Jupiter, Florida 33458

Dear Mr. Taylor:

It is two weeks since Chuck Reid and I visited the studio of

Stations WTRU/WEXI seeking to examine the stations' public file.

When no public file materials were available for Mr. Reid's and my examination, you agreed to copy the public file and send it to me within a week. I agreed to pay your photocopying and postage costs.

To date, you have sent me the following materials:

- 1) Letter dated April 6, 1989 from Robert B. Taylor to Donna R. Searcy transmitting Petition to Deny Jupiter Broadcasting Corp.'s application (FCC File No. BP-890103AB).
- 2) Petition to Deny Jupiter Broadcasting Corp.'s application (FCC File No. BP-890103AB).
- 3) Letter dated July 20, 1989 from Robert B. Taylor to Donna R. Searcy transmitting Petition to Deny Jupiter Broadcasting Corp.'s application (FCC File No. BPH-890103MD).
- 4) Petition to Deny Jupiter Broadcasting Corp.'s application (FCC File No. BPH-890103MD).

Please send me copies of the remaining public file materials for Station WTRU and WEXI immediately. A return pre-paid Federal Express envelope is enclosed for your convenience.

It is unreasonable to withhold copies of the stations' public file for two weeks, after agreeing to provide copies within one week. I need an accurate account of the documents that Stations WTRU and WEXI maintain for public inspection. These documents are important to my representation of Jupiter Broadcasting Corp. in the pending comparative renewal proceeding for Stations WTRU/WEXI.

Once again, I am enclosing a copy of the FCC's public file rule, Rule 73.3526, to assist you in making records available.

Thank you for your prompt attention to this request.

Sincerely yours,

Joseph A. Belisle
Counsel for
Jupiter Broadcasting Corporation⁷

⁷See Declaration of Tania M. Sanchez attached hereto as Exhibit 6.

9. No timely response to JBC's counsel's July 25, 1990 letter was received. On August 20, 1990, Charles Reid visited the WEXI/WTRU studios and again requested the stations' public file. No public file documents were made available to Mr. Reid.⁸

10. On August 20, 1990 JBC's counsel sent the following letter to Stations WTRU/WEXI's program director:

VIA FEDERAL EXPRESS

Mr. Steve May
Program Director
Stations WTRU/WEXI
500 North Delaware Boulevard
Jupiter, Florida 33458

Dear Mr. May:

I am informed by Charles Reid that he visited your stations' studio during normal business hours today and asked to see your stations' public files. Mr. Reid tells me that you had no public file materials for him to examine.

You will recall that Mr. Reid and I visited you at Stations WTRU/WEXI on July 12 of this year. At that time you had no public file materials to review. However, you called Mr. Taylor (in Michigan) and he agreed to photocopy the public file and mail it to me.

To date, I have received the following materials from WTRU/WEXI:

- 1) Letter dated April 6, 1989 from Robert B. Taylor to Donna R. Searcy transmitting Petition to Deny Jupiter Broadcasting Corp.'s application (FCC File NO. BP-890103AB).
- 2) Petition to Deny Jupiter Broadcasting Corp.'s application (FCC File No. BP-890103AB).
- 3) Letter dated July 20, 1989 from Robert B. Taylor to Donna R. Searcy transmitting Petition to Deny Jupiter Broadcasting Corp.'s application (FCC File No. BPH-890103MD).

⁸See Exhibit 2.

- 4) Petition to Deny Jupiter Broadcasting Corp.'s application
FCC File No. BPH-890103MD).

Please send me copies of any remaining public file materials maintained for Stations WTRU and WEXI immediately. A return prepaid Federal Express envelope is enclosed for your convenience.

As I have previously informed Mr. Taylor, I require an accurate account of the documents that Station's WTRU and WEXI maintain for public inspection.

These documents are important to my representation of Jupiter Broadcasting Corp. in the pending comparative renewal proceeding for Stations WTRU/WEXI.

Once again, I am enclosing a copy of the FCC's public File rule, Rule 73.3526, to assist you in making records available.

Thank you for your prompt attention to this request.

Sincerely yours,

Joseph A. Belisle
Counsel for
Jupiter Broadcast Corporation⁹

11. JBC's August 20, 1990 letter was delivered to Stations WEXI/WTRU but was subsequently returned to JBC's counsel at the request of the recipient. See Exhibit 8.

12. On September 25, 1990, counsel for JBC received the following letter (dated September 17, 1990) purporting to include the remaining items of the WEXI/WTRU public file:

Joseph A. Belisle
One S.E. Third Ave., Suite 1450
Miami, Florida 33131

Dear Mr. Belisle:

Your distortion of our telephone agreement of July 12, 1990,

⁹See Declaration of Tania M. Sanchez appended hereto as Exhibit 7.

is reprehensible. I did agree to photocopy the public file and send it to you. I explained to you this would occur upon my return to Jupiter from Indiana where I operate another radio station. I returned today.

I consider your actions in this matter to be nothing short of harassment. I explained to you that the documents in the public file are the same as they were last year when your clients Paul Levine and Charles Reid examined these same papers.

Although you knew I was in Indiana and Michigan, you sent multiple Federal Express deliveries to my Jupiter office for no reason. You even insisted on harassing my employees by sending correspondence directly to my employee Steve May.

At this time I warn you: Do not contact my employees and do not attempt to interrupt my business.

Enclosed are copies of the other items in the public file. In the future you will get better results if you contact me directly and set up an appointment in advance.

Sincerely,

Robert B. Taylor
Licensee, WTRU & WEXI¹⁰

13. Enclosed with Mr. Taylor's September 17, 1990 letter were the following documents:

- (a) Application for Renewal of License for WKSJ(FM) [now WTRU], Jupiter, Florida dated 9/22/88;
- (b) Application for Renewal of License for WTRU(AM) [now WEXI], Jupiter, Florida dated 9/22/88;
- (c) Ownership Report for Station WKSJ(FM) [now WTRU] dated 9/22/88;
- (d) Annual Employment Report 1990 for Station WTRU(FM) dated 5/18/90;
- (e) Annual Employment Report 1990 for Station WEXI dated 5/18/90;
- (f) Letter dated 1/27/89 from Robert B. Taylor to Donna R. Searcy transmitting an opposition to petition to deny;

¹⁰See Exhibit 5.

- (g) Opposition to Petition to Deny dated 1/27/89 filed on behalf of Station WKSJ [now WTRU] in FCC File No. BRH-880926UJ;
- (h) Letter dated 1/3/89 from Nora E. Garrote to Donna R. Searcy transmitting a petition to deny the WSKY(FM) [now WTRU] renewal application; and
- (i) Petition to Deny the WSKY(FM) [now WTRU] renewal application filed by Jose Oaks on 1/3/89.¹¹

14. The facts set out above demonstrate that Robert Taylor has made no meaningful effort to maintain a public inspection file for Stations WEXI and WTRU. First, there is no public inspection file available at the stations' studio during normal business hours.¹² Parties requesting machine copies of the stations' public inspection file must make repeated efforts over several weeks to obtain documents relevant to the stations.¹³ Moreover, most of the documents required to be placed in the public file don't exist.

15. Specifically, Stations WEXI/WTRU's public file contains no issues/programs lists.¹⁴ It omits all records relating to

¹¹See Exhibit 5.

¹²See 47 C.F.R. §73.3526(d). This fact is confirmed by the declarations of former station employees Steve May, Sheri McKin and Lorraine Popovich attached hereto as Exhibits 13, 14 and 15, respectively.

¹³Such copies are required to be furnished within seven days. See 47 C.F.R. §73.3526(f).

¹⁴These lists must be placed in the stations' public file quarterly. See 47 C.F.R. §73.3526(a) (9).

broadcasts by candidates for public office.¹⁵ It contains only a portion of the documents required to be filed with license renewal applications.¹⁶ It omits annual employment reports for years 1981-1989.¹⁷ It contains no letters from the public.¹⁸

16. The nonexistence of the WEXI/WTRU public file is confirmed by the stations' former employees. Steve May, the WTRU(FM) program director worked at the station from November 1989 to November 1990. He has declared under penalty of perjury that the station did not maintain a public inspection file at its studios.¹⁹ Similarly, Sheri McKin, the stations' sole clerical worker from May 1985 until December 1986 never saw a public access file at the stations.²⁰ Neither did Lorraine Popovich a former account executive at the stations.²¹

17. Stations WEXI/WTRU Renewal Applications. Despite the fact that Stations WEXI/WTRU had no public inspection file, Robert Taylor answered the following inquiry in their renewal applications

¹⁵See 47 C.F.R. §§73.3526(a) (4) and 73.1940(d).

¹⁶It contains no Broadcast Equal Employment Opportunity Report, FCC Form 396. It contains no data with respect to the station's compliance with the ANSI standards for exposure of humans to non-ionizing radiation.

¹⁷See 47 C.F.R. §73.3526(a) (5).

¹⁸See 47 C.F.R. §73.3526(a) (7).

¹⁹See Declaration of Steven May appended hereto as Exhibit 13.

²⁰See Statement of Sheri McKin appended hereto as Exhibit 14.

²¹See Statement of Lorraine Popovich appended hereto as Exhibit 15.

affirmatively:

Has the applicant placed in its public inspection file at the appropriate times the documentation required by Section 73.3526 or 73.3527 of the Commission's rules?²²

18. Station WTRU Silence. Robert B. Taylor acquired control of Station WTRU(FM) on September 18, 1984. On December 29, 1986, Mr. Taylor began taking steps to turn off WTRU. He laid-off the station's non-air staff. When asked by the receptionist for an explanation of why she was fired, he said he was closing the station because he wasn't making any money.²³

19. By March of 1987, Robert Taylor had completely silenced both of his Jupiter, Florida stations. A West Palm Beach County Deputy Sheriff attempted to serve a summons and complaint at the stations' studio on March 26, 1987. His report on service of process stated, in part, that the "premises of the radio station appears to be unused for a period of time. The local phone number has been changed to 219/484-0580."²⁴

²²The WEXI(AM) and WTRU(FM) renewal applications are attached hereto as Exhibit 9. At the time these applications were filed, the stations' call signs were WTRU(AM) and WKSX(FM). The licensees at that time were corporations wholly owned by Robert B. Taylor. Mr. Taylor signed both renewal applications.

²³See Statement of Sheri McKin appended hereto as Exhibit 14. See also Statement of Lorraine Popovich appended hereto as Exhibit 15.

²⁴See Exhibit 10. This new telephone number was the telephone number of Mr. Taylor's Fort Wayne, Indiana FM station, WXKE.

20. Mr. Taylor, through counsel, sought silence authority for his Jupiter FM station on April 30, 1987.²⁵ This April 30, 1987 silence authority request attempted to justify taking WTRU(FM) off the air, arguing (a) the reason WTRU(FM) went silent was to accommodate a frequency change for a Homestead, Florida station; (b) WTRU(FM) might be required to undergo a second frequency change due to a Melbourne, Florida rule making proposal; (c) multiple frequency changes would disrupt the business of Mr. Taylor's station; and (d) Mr. Taylor could not afford the cost of repeated disruption of his station's business.

21. Mr. Taylor's April 30, 1987 silence authority request was thoroughly disingenuous. It falsified the date that WTRU ceased operations.²⁶ It falsely intimated that WTRU's silence was required by the operation of new Homestead, Florida FM station.²⁷ It used the Melbourne, Florida rule making proposal, a proposal supported by Mr. Taylor, as the reason why WTRU could not remain

²⁵All documents relating to WTRU(FM)'s silence authority that JBC has been able to obtain from the Commission are appended hereto as Exhibit 11. The original request for authority to remain silent is Exhibit 11, pp 1-2.

²⁶The April 30, 1987 request stated that the station ceased operations on April 1, 1987. However the station was vacant on March 26, 1987. See supra para. 19.

²⁷The Homestead station, WXDJ, did not commence operations until July 17, 1987, four months after Robert Taylor took Station WTRU off-the-air. See Exhibit No. 16. Moreover nothing prevented Mr. Taylor from timely effectuating the WTRU channel change necessary to accommodate the Homestead station. The costs of this channel change were required to be borne by the Homestead station. See Homestead, Florida, 47 RR2d 1280, 1283 (Policy and Rules Div. 1980). Apparently Mr. Taylor simply pocketed the funds for this channel change and turned WTRU off.

operating.²⁸

22. In letters filed with the Commission on July 31, 1987, October 30, 1987 and February 1, 1988, Mr. Taylor sought repeated extensions of WTRU(FM)'s silence authority, reiterating his "uncertain channel allotment" theme. See Exhibit 11, pp. 4-8, 10-15 and 17-18. The Commission completed its Melbourne, Florida rule making on February 10, 1988, changing the WTRU(FM) allotment to Channel 258A. See Report and Order MM Docket No. 87-233, 3 FCC Rcd 611 (1988).

23. Mr. Taylor filed an additional WTRU(FM) silence authority request on April 29, 1988. Therein, Mr. Taylor asserted that an FM application to operate on Channel 258A had been prepared and forwarded to the Commission.²⁹ Mr. Taylor asked to remain silent until after the application was granted.³⁰ The application, however, was never granted. It was returned on June 23, 1988, as unacceptable for tender.³¹

²⁸Mr. Taylor's corporation was a proponent of the Jupiter channel change proposed in the Melbourne rule making. He twice filed pleadings in support of the channel change - first supporting the petition for rule making and then supporting the changes proposed in the notice of proposed rule making. See Jupiter and Melbourne, Florida 2 FCC Rcd. 3940 (1987); and Jupiter and Melbourne, Florida, 3 FCC Rcd. 611 (1988). The Melbourne rule making was hardly an event beyond Mr. Taylor's control requiring Station WTRU to remain silent.

²⁹The application was received at the Commission on May 2, 1988. See BPH-880502IC

³⁰See Exhibit 11, pp. 20-21.

³¹See Broadcast Actions, Report No. 20348, released June 29, 1988.

24. On July 28, 1988, Mr. Taylor sought yet another extension of the WTRU(FM) silence authority. See Exhibit 11, pp. 23-24. This extension request proffered the following, rather remarkable, rationale for the extension:

As explained in its letter of April 29, 1988, U.S. Three has filed its modification application with the Commission (File No. BPH-880502IC). That application has not yet been granted. Therefore, the station is not yet in a position to resume operations.

The application that Mr. Taylor's request identified as "not yet...granted" was, of course, the very application that the Commission had returned as unacceptable for tender a month earlier.

25. Mr. Taylor filed a second construction permit application to operate WTRU(FM) on Channel 258A. This second application, BPH-880813IE, was granted November 15, 1988. Meanwhile, WTRU(FM)'s silence authority lapsed on November 1, 1988. By letter dated November 9, 1988, Mr. Taylor sought to reinstate WTRU(FM)'s silence authority. This request was granted through February 1, 1989, with the admonition that "no further extension of this authority [was] contemplated." Exhibit 11, p. 28.

26. Predictably, Mr. Taylor did not construct WTRU(FM)'s modified facilities prior to the February 1, 1989 expiration of silence authority. On January 24, 1989 he sent the Commission an extension request for an additional sixty days to construct the modified WTRU(FM) facilities. This request was granted and WTRU(FM) was authorized to remain silent until April 1, 1990. Ex. 11, pp. 29-31.

27. Mr. Taylor's WTRU(FM) silence authority lapsed April 1,

1990. WTRU did not file its channel 258A license application until May 10, 1989. See BLH-890510KC. Apparently Mr. Taylor kept the station silent without Commission authority for the entire month of April, 1989.³²

28. The facts establish that Mr. Taylor took WTRU(FM) off-the-air solely for reasons within his control. Under the Commission's policy adopted in Circleville, Ohio, 8 FCC 2d 159, 163-64 (1967), Mr. Taylor was entitled to reimbursement for the costs WTRU(FM) incurred as a result of WTRU(FM)'s involuntary channel change to accommodate the Homestead, Florida allotment.³³ In fact, Radio Intermart Corporation paid Mr. Taylor for the reasonable costs he would incur in changing WTRU(FM)'s frequency to accommodate the Homestead, Florida FM allotment.³⁴ Mr. Taylor received this payment even though he never made the channel change contemplated in Homestead Florida, supra. He simply took Radio Intermart's money and turned off Station WTRU(FM).

29. Mr. Taylor was not reimbursed for the WTRU(FM) channel change proposed in the Melbourne, Florida FM allotment proceeding

³²The earliest WTRU could have commenced operations on program test authority was ten days before its license application was filed, i.e. April 30, 1989. See 47 C.F.R. §73.1620 (a).

³³Reimbursable costs include cost of engineering, legal representation, technical equipment, printing, advertising and out-of-pocket expenses while the station was off-the-air.

³⁴Indeed, the Commission's action allotting the Homestead channel expressly contemplated compensation to WTRU(FM) for the costs of its channel change. See Homestead, Florida, 47 RR2d 1280, 1283 (Policy and Rules 1980).

because that channel change was voluntary. WTRU(FM) was a proponent of the Jupiter, Florida channel change advocated in the Melbourne FM rule making. This second WTRU(FM) channel change was an unsuccessful attempt to obtain a frequency that could be upgraded to a higher class FM allotment. Unquestionably WTRU(FM)'s two years of silence was caused solely by Robert Taylor for the financial benefit of Robert Taylor.

30. WEXI(AM)'s Silence. Robert B. Taylor kept Station WEXI(AM) off-the-air from March of 1987 until the Station's deletion in January 1992. Mr. Taylor kept Station WEXI(AM) dark solely for reasons within his control. He kept the station dark for years without any colorable FCC authority.

31. Station WEXI(AM) was silenced at the same time WTRU(FM) was taken off the air. Exhibit 11, p.2. Apparently, Mr. Taylor filed a specific request for AM silence authority on May 12, 1987.³⁵ ³⁶ On May 21, 1987, the AM Branch gave the following response to Mr. Taylor's request:

**REF. 8910-ARE. RELET BAYES 5-12-87. TEMPORARY AUTHORITY TO
REMAIN SILENT GRANTED THRU 8-1787, WTRU, JUPITER, FLORIDA,
PENDING RESOLUTION OF FINANCIAL DIFFICULTIES AND EQUIPMENT**

³⁵A joint request for AM and FM silence authority was filed April 30, 1987. Ex. 11, p.1. The FM Branch, in acting on this request, directed Mr. Taylor to seek AM silence authority from the AM Branch. Ex. 11, p.3.

³⁶JBC has been unable to obtain the May 12, 1987 request from the Commission's files or from the WEXI(AM) public file. All documents JBC has obtained concerning the various WEXI(AM) requests for silence authority are attached as Exhibit 12.

REPAIRS TO TRANSMITTER AND GROUND SYSTEM. ANY REQUEST FOR EXTENSION MUST SHOW SPECIFIC STEPS ARE BEING TAKEN TO RESUME OPERATION. NECESSARY TO MAINTAIN PRESCRIBED TOWER LIGHTING.³⁷

32. Mr. Taylor's next request for AM silence authority was filed August 17, 1987. This request took great pains to show progress toward returning WEXI(AM) to the air. Specifically, the licensee represented:

Since the filing of U.S. Two's previous request for authority for WTRU(AM), the licensee has made substantial progress toward restoring the AM facilities to operational status. Specifically, the relays in the AM station's primary transmitter have been replaced, and the transmitter is now operational. The station's ground system had been damaged by debris from construction in an adjacent housing development. U.S. two prevailed upon the contractor to remove the foreign material from the station's ground system, and that system is also now operational.³⁸

33. The AM Branch responded to Mr. Taylor's August 17, 1987 request on December 24, 1987. It extended Mr. Taylor's AM silence authority through February 29, 1988. It also required that "Any request for extension must be accompanied by detailed report of specific steps being taken to return stations to air." Exhibit 12, p.11.

34. Robert Taylor filed for extended AM silence authority on February 29, 1988. Predictably, this request contained a convincing demonstration of steps taken to ready station WEXI(AM) [then WTRU (AM)] for operation. After noting that the station had been silent, in part, because of the need for repairs, the licensee

³⁷See Exhibit 12, p.1.

³⁸See Exhibit 12. p.3.

represented that "The repair work has now been completed, and it is only the financial impossibility of stand-alone operation which detains WTRU from returning to the air." Exhibit 12, pp. 12-13. This explanation was credited and Mr. Taylor's AM silence authority was extended through May 2, 1988. Exhibit 12, p. 14.

35. WEXI(AM)'s silence authority was extended to July 31, 1988 in response to a May 2, 1988 extension request. Exhibit 12, p. 15. On July 28, 1988, the licensee sought additional authority to keep WEXI(AM) off the air, again explaining that WEXI(AM) [then WTRU(AM)] had been repaired and was simply awaiting completion of the FM channel change to resume operations. Exhibit 12, pp. 16-17. These same representations were reiterated in Mr. Taylor's October 31, 1988 request for extension of AM silence authority. Indeed the October 31st request went so far as to represent that the licensee was reassembling a station staff and was "taking the other necessary steps to put WKSX and WTRU back in operation." Exhibit 12, pp. 18-19.

36. Despite Mr. Taylor's repeated assurances that WEXI(AM) was repaired and ready to return to the air, the station remained silent from March of 1987 until its deletion in 1992. It was silent even though its FM counterpart resumed operating in May 1989. The last Commission document authorizing Mr. Taylor to keep WEXI(AM) silent expired in April 1989. Exhibit 12, p. 22.

ARGUMENT

I. Robert Taylor's Public Issue Programming Record Requires Denial Of Renewal Expectancy.

37. The Review Board has held that the preparation and maintenance of issues/programs lists for inclusion in a station's public file is a minimal requirement for operation in the public interest. Safe Broadcasting Corp., 5 FCC Rcd. 4917, 4918 (Rev. Bd. 1990). Robert Taylor placed no issues/programs lists in the WEXI/WTRU public file. This failure is an admission that Mr. Taylor's stations have broadcast no programs treating issues of community concern.³⁹

38. The Court of Appeals has observed that presentation of issue oriented programs is central to the award of renewal expectancy.⁴⁰ In its view, "Common sense alone dictates that if the Commission has imposed a public interest obligation upon radio licensees to provide programming responsive to community issues, the obligation simply cannot be fulfilled without licensees airing

³⁹See Office of Communication of United Church of Christ v. FCC, 779 F. 2d 702; 59 RR2d 895, 904 (DC Cir. 1985) where the Court explained: "By referring to this list a petitioner to deny would be able to determine whether a broadcaster had provided significant coverage of some set of issues of community concern. The petitioner would be able to assert that by the broadcaster's own admission the programs on this list represented the most significant treatment by that broadcaster of issues that the broadcaster itself thought to be of community concern. If the petitioner could submit affidavits explaining why such programs failed to meet the most minimum qualitative standards, serious doubt would be cast on the overall adequacy of the broadcaster's programming."

⁴⁰See Office of Communications of the United Church of Christ v. FCC, 707 F. 2d 1413; 53 RR2d 1371, 1390 (DC Cir. 1983) where the Court stated "It is also clear that, in the comparative renewal setting, the absolute amount of non-entertainment programming aired by the renewal applicant continues to be one of the important factors demonstrating the 'substantial service' that may entitle the radio licensee to some degree of 'renewal expectancy.'"

some irreducible minimum amount of broadcast minutes." Id. at _____; 53 RR2d at 1390.

39. Robert Taylor, by his own admission, has broadcast no issue oriented programming over stations WEXI/WTRU. This failure, alone, justifies summary decision in JBC's favor on the question of Mr. Taylor's renewal expectancy. Further, as demonstrated below, any attempt by Mr. Taylor to demonstrate the broadcast of issue oriented programming over WEXI/WTRU at this late date would constitute a comparative upgrade.

40. Commission policies prohibiting comparative upgrading preclude Robert Taylor from contesting the accuracy of the public file data on WEXI(AM)'s and WTRU(FM)'s issue oriented programming. Renewal expectancy is a comparative factor based on issue oriented programming. The time for claiming credit for issue oriented programming is at the time issue/programs lists are to be placed in a public file, ie, at the end of each quarter. Certainly such comparative credit was fixed by the time Mr. Taylor filed renewal applications for the stations. Moreover the renewal applications' representation that each station "placed in its public inspection file at the appropriate times the documentation required by Section 73.3526... of the Commission's rules" estopps Mr. Taylor from disputing the contents of the stations' public file with respect to issue oriented programming.

II Robert Taylor's Actions Silencing Stations WEXI/WTRU Require Denial of Renewal Expectancy.

41. The fact is that Robert Taylor silenced stations

WEXI/WTRU so he could use money obtained from Radio Intermart Corporation to finance the FM frequency change that he initiated in the Melbourne, Florida FM rule making. Contrary to the implication in the WTRU/WEXI requests for silence authority, these two stations were taken off-the-air because of Mr. Taylor's voluntary actions. Contrary to Mr. Taylor's specific representations to the Commission, Station WEXI(AM) did not resume operations at the time WTRU(FM) began broadcasting. WEXI(AM) remained silent to the day it was deleted at Mr. Taylor's request.

42. It is impossible to render the type of "substantial service" to a community that justifies renewal expectancy with a station that is off-the-air. In Marr Broadcasting Co., 1 FCC Rcd. 691, 712 (A.L.J. 1986), Administrative Law Judge Chackin was faced with a renewal applicant that had voluntarily silenced its station for 20 of the 26 months it had held the license.⁴¹ The renewal applicant, like Mr. Taylor, had misrepresented facts in its various requests to keep its station silent. Judge Chachkin denied the applicant renewal expectancy, stating, inter alia:

In the instant case, it can only be concluded that Marr most certainly failed to provide minimally acceptable service to Galveston during its tenure as licensee of Station KXXK during the 1980-83 renewal period. In fact, Marr's total abandonment of its community of license is without precedent in reported FCC decisions of comparative renewal proceedings. Marr provided absolutely no service whatsoever for 20 of the 26 months that it held the license during this term. Moreover, as established in the findings, Station KXXK's silence was not caused by circumstances beyond Marr's control; rather, the station was dark as the result of a deliberate business judgment on the part of Marr's owners to take the

⁴¹JBC notes that WEXI was off-the-air for over four years. WTRU(FM) was off-the-air for at least 25 months.

station off the air. The owners initially intended to return to the air only after improved facilities for the station, which would make it a more profitable station, were constructed. Later, instead of engaging in a diligent effort to return to the air, Marr's owners decided to solicit and entertain offers to purchase the silent facility with its bare license and construction permit to make it a more powerful operation.

The seriousness of Marr's failure to broadcast cannot be understated. As the Commission itself has stated, the "prolonged suspension of station operation deserves the public interest..." Application for Renewal of License, 37 RR 2d 1, 10 (1976): Cf. Federal Broadcasting System, Inc., 38 RR 2d 692, 698 (1976) ("... to permit ... any ... licensee to maintain a silent station for an extended and indefinite length of time would frustrate the efficient utilization of available radio frequencies which the Commission is mandated by law to ensure"); United Television Co., Inc., 46 FCC 2d 698, 700 (1974) ("any prolonged period of silence is inconsistent with the public interest").

Moreover, as demonstrated above, KXXK's silence was initially authorized by the Commission in reliance upon false representations and lack of candor on the part of Marr concerning the circumstances surrounding the station's being taken off the air. In addition, even though Marr later told the Commission that it intended that Station KXXK would remain off the air until its new facility was built, the Commission's authorization of the station's silence does not constitute a justification for being off the air which would salvage for Marr a "renewal expectancy." There was no "act of God" or other cause beyond Marr's control to excuse the failure to broadcast. Indeed, as stated in the findings, Marr could have gone back on the air at any time from a replacement studio in Galveston (either at KGBC or elsewhere) using KXXK's transmitter and antenna at KGBC, which remained in place. While Marr attributed its going off the air to "decreasing revenues" and "economic problems," financial difficulties do not excuse a licensee from fulfilling its obligations to operate in the public interest.


Furthermore, Marr's service during the short period it actually operated Station KXXK (May 1981 through December 1981) was insufficient to warrant a "renewal expectancy." First, Marr submitted absolutely no evidence that it had even attempted to ascertain what issues were important to the community of Galveston so that the station could broadcast programs in response to those concerns. The evidence demonstrates that Marr's issues/programs lists for the pertinent periods were not in its public inspection file and Marr produced no evidence that such lists were ever compiled. In view of this complete failure of proof in the area of ascertainment, Marr cannot connect what little public affairs programming it broadcast to any ascertained problem or need,

which is a fundamental prerequisite for the extension of credit for such programing. See, Broadcast Renewal Applicant, 66 FCC 2d at 428.
1 FCC Rcd at 712.

CONCLUSION

43. JBC submits that it has submitted evidence, supported by affidavit or subject to official notice, that establishes: (a) Stations WEXI/WTRU broadcast no issue oriented programming during the license period; (b) Robert Taylor voluntarily removed Stations WEXI/WTRU from operation for significant periods of time; and (c) Robert Taylor misrepresented facts and lacked candor in obtaining silence authority for Stations WEXI/WTRU. Each one of these facts warrants denial of Robert Taylor's renewal expectancy in this proceeding. No genuine issue of material fact concerning renewal expectancy remains for determination at hearing.

Respectfully submitted,



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